THE EXTENSION TO THE ADMIRALTY OF THE FELLOW SERVANT DOCTRINE.

IT surely needs no argument to show that if several different systems of law are being administered in the same jurisdiction each must be confined to and be administered by the courts undertaking to administer it, or there will be no certainty in the law, and litigation will become a lottery. Perhaps some persons consider it so now, but we must not encourage that notion. It will not do for a common law court to proceed in accordance with the admiralty law, nor for an admiralty court to proceed in accordance with the common law. The fact that in the United States the judges who exercise the admiralty jurisdiction have also common law jurisdiction makes it somewhat difficult to keep the two systems separate.

It was therefore with a feeling of relief that the bar, after seeing the common law doctrine of contributory negligence applied by a number of the district and circuit courts of the United States sitting in admiralty, beheld the doctrine cast out and discredited as an admiralty rule when the matter was finally brought to the attention of the Supreme Court of the United States.[1] It is with a corresponding feeling of regret that we now see another doctrine belonging exclusively to the common law admitted (luckily only to the extent of a *dictum* as yet) into the admiralty jurisprudence by that same court in the case of the Osceola.[2] This is the so-called fellow servant doctrine, by which an employer is not liable to one servant for injuries received through the negligence of another servant in the common employment. It is extended in the Osceola case to seamen on board of a ship, as follows: "All the members of the crew except perhaps the master are as between themselves fellow servants, and *hence* seamen cannot recover for injuries sustained through the negligence of another member of the crew, beyond the expense of their maintenance and cure." (They are allowed maintenance and cure under another provision of the admiralty law.)

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[1] The Max Morris, 137 U. S. 1.

[2] 189 U. S. 158.

This extension is entirely gratuitous, for the true and ancient admiralty rule, which the court next lays down, entirely disposes of the case: "The seaman is not allowed to recover an indemnity for the negligence of the master or any member of the crew, but is entitled to maintenance and cure whether the injuries were received by negligence or accident."[1]

It is seen, therefore, that this doctrine of fellow servant is not necessary in admiralty, for a servant is prevented from recovering against an employer, or the ship, for the negligence of another servant, by the fact that the doctrine of *respondeat superior*, when properly applied, does not have its full force in the admiralty. In fact, before the last twenty years no case of a recovery of a servant against an employer *in personam*[2] for the negligence of another servant in the employ of the same master, whether coming within the techical definition of a fellow servant or not, can be found in the reports of admiralty cases in the United States, and as Judge Addison Brown says, speaking of seamen:[3] "No authority in the ancient or modern codes, in the recognized text books, or the decisions on maritime law can be found allowing such a recovery, and the absence of any authority holding the owner of the vessel liable is evidence of the strongest character that no liability under the maritime law exists." The same words could have been used at that time with truth of all actions *in personam* in admiralty by all servants against the employer for negligence of other servants as well as actions by seamen.

The first case in which the doctrine of fellow servant was applied by a court of the United States sitting in admiralty is Halverson *v.* Nisen,[4] where Judge Hoffman applied it in the district court for the District of California, but he cites only common law authorities in support of it.

The Supreme Court has overruled in the Max Morris the decisions of many of the lower courts applying in admiralty the doctrine of contributory negligence. In the same way, when the question is fairly presented, it can exclude the doctrine of fellow servant as well from the admiralty jurisprudence and by so doing clear the air. Now, however, by its *dictum* in the Osceola case,

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[1] See the Osceola, 189 U. S. 158, 175.

[2] In actions *in rem* the recovery is on a different principle from *respondeat superior*. See Sherlock *v.* Alling, 93 U. S. 99–108.

[3] The City of Alexandria, 17 Fed. Rep. 390.

[4] 3 Sawyer 562, 11 Fed. Cas. 310.

that the liability of the ship for an injury to one seaman by the negligence of another does not exist *because they are fellow servants*, it implies that unless the servants are fellow servants in the technical sense of the common law a liability on the part of the employer does or may exist. Accordingly, we shall probably see many such cases of servant against employer or ship, and shall have to determine in each case, as at common law, whether the servants are in a common employment or not; for instance, whether a stevedore, longshoreman, cattleman, seaman, etc., are in a common employment, whether the foreman, stevedore, boatswains, mates, master, etc., are vice-principals, and the whole doctrine is fairly launched into the admiralty law.

It is all the more unfortunate at this late day, because the doctrine of fellow servant, first enunciated in England in 1837 in the case of Priestley *v.* Fowler,[1] has hardly been approved, and the legislatures both in England and this country by their employer's liability acts have been gradually paring it down and changing it. It arose in the first place as one of the attempts by the common law courts to mitigate the harshness and injustice of *respondeat superior:* in admiralty, *respondeat superior* has not been applied *in personam* with the same harshness in this particular, and there is no need of such mitigation. It is to be hoped that as this part of the decision of the Supreme Court in the Osceola case, though contained in a solemnly declared and carefully drawn article, is really only a *dictum*, it may be revised and overruled when the subject is brought to its attention again.

Frederic Cunningham.

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[1] 3 M. & W. 1.

ALL CASES IN ADMIRALTY IN WHICH THE FELLOW SERVANT DOCTRINE HAS BEEN INVOKED BY THE FEDERAL COURTS SINCE HALVERSON *v.* NISEN.

The Chandos, 4 Fed. Rep. 645 (1880), Dist. of Oregon.
The Clatsop Chief, 8 Fed. Rep. 163 (1881), Dist. of Oregon.
The Victoria, 13 Fed. Rep. 43 (1882), Circ. Ct. Dist. of Mass.
The City of Alexandria, 17 Fed. Rep. 390 (1883), So. Dist. N. Y.
The E. B. Ward, Jr., 20 Fed. Rep. 702 (1884), E. Dist. Louisiana.
The Harold, 21 Fed. Rep. 428 (1884), So. Dist. N. Y.
The Titan, 23 Fed. Rep. 413 (1885), Circ. Ct. So. Dist. N. Y.
The Islands, 28 Fed. Rep. 478 (1886), Dist. of New Jersey.
The Furnessia, 30 Fed. Rep. 878 (1887), E. Dist. N. Y.
The Phœnix, 34 Fed. Rep. 760 (1888), Dist. of So. Carolina.
The Egyptian Monarch, 36 Fed. Rep. 773 (1888), Dist. of N. J.
The Wells City, 38 Fed. Rep. 47 (1889), E. Dist. N. Y.

The Queen, 40 Fed. Rep. 694 (1889), So. Dist. N. Y.
The Sachem, 42 Fed. Rep. 66 (1890), E. Dist. N. Y.
The A. Heaton, 43 Fed. Rep. 592 (1890), Circ. Ct. Dist. of Mass.
The Servia, 44 Fed. Rep. 943 (1891), So. Dist. N. Y.
The Frank and Willie, 45 Fed. Rep. 494 (1891), So. Dist. N. Y.
The Walla Walla, 46 Fed. Rep. 198 (1891), No. Dist. Wash.
Grimsley *v.* Hankins, 46 Fed. Rep. 400 (1891), Dist. of Ala.
The City of Norwalk, 55 Fed. Rep. 98 (1893), So. Dist. N. Y.
The Bolivia, 59 Fed. Rep. 626 (1893), So. Dist. N. Y.
Red River Line *v.* Cheatham, 60 Fed. Rep. 517 (1894), C. C. A. 5th Circ.
The Transfer No. 4, 61 Fed. Rep. 364 (1894), C. C. A. 2nd Circ.
The Ravensdale, 63 Fed. Rep. 624 (1894), So. Dist. N. Y.
The Victoria, 69 Fed. Rep. 160 (1895), E. Dist. N. Y.
Herman *v.* Mill Co., 71 Fed. Rep. 853 (1896), No. Dist. Cal.
The Coleridge, 72 Fed. Rep. 676 (1896), So. Dist. N. Y.
The Louisiana, 74 Fed. Rep. 748 (1896), C. C. A. 5th Circ.
The Peninsular, 79 Fed. Rep. 972 (1897), E. Dist. N. Y.
The Job T. Wilson, 84 Fed. Rep. 204 (1897), Dist. of Md.
McGough *v.* Ropner, 87 Fed. Rep. 534 (1898), E. Dist. Pa.
The Anaces, 87 Fed. Rep. 565 (1898), E. Dist. N. Car.
The Miami, 87 Fed. Rep. 757 (1898), E. Dist. N. Y.
The Antonio Zambrana, 89 Fed. Rep. 60 (1898), E. Dist. N. Y
The Kensington, 91 Fed. Rep. 681 (1899), So. Dist. N. Y.
Carlson *v.* Pilot's Assoc., 93 Fed. Rep. 468 (1899), So. Dist. N Y.
Olson *v.* R. R. Co., 96 Fed. Rep. 109 (1899), No. Dist. Cal.
104 Fed. Rep. 574 (1900), C. C. A. 9th Circ.
The Picqua, 97 Fed. Rep. 649 (1899), So. Dist. N. Y.
The Slingsby, 120 Fed. Rep. 748 (1903), C. C. A. 2nd Circ.
Memphis, etc., Co. *v.* Hill, 122 Fed. Rep. 246 (1903), C. C. A. 8th Circ.
Sievers *v.* Eyre, 122 Fed. Rep. 734 (1903), So. Dist. N. Y.
The Gladestry, 128 Fed. Rep. 591 (1904), C. C. A. 2nd Circ.
The Elton, 131 Fed. Rep. 562 (1904), E. Dist. Pa.